No. 3103

United States Circuit Court of Appeals

For the Ninth Circuit

PORTLAND CATTLE LOAN COMPANY,
A CORPORATION
Plaintiff in Error
vs.
OREGON SHORT LINE RAILROAD COMPANY,
A CORPORATION
Defendant in Error

Brief for Plaintiff in Error

On Writ of Error to the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE.

This action is one to recover a balance of freight charges claimed to be due for the transportation of a trainload of cattle from Hereford, Texas, to destinations in Idaho and Montana. Hereford is a station on the Pecos and Northern Texas Railway a short distance from Amarillo, which under the tariffs was a base point for rate-making. The ship-

ment moved through Amarillo and the dispute is over the claim of the railway company (asserted years after the shipment was handled) that the through rate from the base point, Amarillo, was not applicable from Hereford, and that an additional local rate of $26.40 was collectible.

The shipment in question was made by A. G. Greenameyer to plaintiff in error as consignee in September, 1912. It consisted of 44 carloads of cattle (consolidated into 43 cars at Amarillo), 27 of which were delivered to the consignee at Pocatello, Idaho, and the remaining 16 at a station near Butte, Montana (Transcript, pp. 6, 7). The defendant in error, Oregon Short Line Railroad Company, was the delivering carrier, and upon bills rendered by it in October, 1912, payment of the freight charges was made by plaintiff in error. For the cattle which were delivered at Pocatello, a rate of $136.50 per car was assessed. This was made up of two items—$116.50 covering the transportation from Hereford to Idaho Falls, and $20.00 (incorrectly collected, as later admitted) for the back haul from Idaho Falls to Pocatello (Transcript, pp. 98, 117, 118, 119, 173). The charges for the part of the shipment delivered at or near Butte were made up in the same way; that is, $116.50 per car was charged from point of origin to Idaho Falls, and an added charge was made to cover the transportation from there to Butte (Transcript, p. 179).

The question in dispute here is whether the tariffs justified the charge of $116.50 per car on the entire shipment from Hereford to the Idaho points; the carriers now contending that the $116.50 rate was not applicable from Hereford, the point of origin of the shipments, but that a local charge of $26.40 per car was and is collectible to cover the transportation from Hereford to Amarillo (Transcript of Record, p. 16). Plaintiff in error insists that the original construction given the tariffs is the correct one, and that there was ample tariff authority for applying the $116.50 Amarillo rate to shipments originating at Hereford, and that no further charge is now properly assessable.

The shipment moved in September, 1912 (Transcript of Record, p. 6). Over two years later plaintiff in error opened correspondence with the General Freight Agent and with the Auditor of the Oregon Short Line Company (Transcript, p. 116), calling attention to the fact that the $116.50 rate was applicable and complaining that on the cars delivered at Pocatello, Idaho, $20.00 additional per car had been collected for the theoretical back haul from Idaho Falls (the destination point named in the tariff) to Pocatello. After some argument it was admitted that no higher rate was chargeable to Pocatello than to Idaho Falls, and a refund of $20.00 per car on the 26 cars was made. (Transcript, pp. 119, 92.) Thus the $116.50 from point of origin

was confirmed and "protected" by defendant in error almost two and one-half years after the shipment (Transcript, pp. 119, 92); and almost three years from the time of the shipment elapsed before any one connected with the transaction—the Oregon Short Line Company or any of its connecting carriers—advanced the claim that the tariffs forbade applying the $116.50 Amarillo rate to Hereford shipments, and that a local charge of $26.40 per car to cover the haul from Hereford to Amarillo was collectible (Transcript, pp. 111, 110).

The finding of the trial court was in favor of the construction of the tariff now advocated by the carriers and which required the collection of the local rate of $26.40 per car (from Hereford to Amarillo) in addition to the through rate already paid. This writ of error challenges the finding so made.

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the motion of plaintiff in error for findings in its favor upon the ground that the tariffs of defendant in error and its connecting carriers authorized the rate originally collected and did not permit or require the subsequent collection of any additional charges.

II.

The court erred in making and entering general findings for defendant in error and in holding and determining that the tariff of defendant in error and its connecting carriers authorized and required the collection from plaintiff in error of any freight charges for the transportation of its shipment in addition to those previously assessed and paid.

ARGUMENT.

The single question in this case is whether or not the tariffs of the railway company required the collection of a "local" charge for trainload shipments of cattle from Hereford to Amarillo in addition to the through rate from Texas points to Idaho points on the Oregon Short Line Railroad; to this question both assignments of error are addressed. Concededly the Interstate Commerce Act requires the carriers to collect and the shippers to pay whatever the duly filed and published tariffs say is the rate. *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242. We are concerned, therefore, with the meaning of the railway tariffs applicable to the shipments of plaintiff in error; not necessarily the meaning which a careful judicial examination would arrive at, but the meaning which it may fairly be said was conveyed by its terms to interested shippers.

Railway tariffs are designed to fix rates which under all circumstances must be adhered to; and the tariffs are published for the purpose of advising shippers definitely and certainly what rates will apply to their shipments. If the tariffs are obscure or confused, or if they are ambiguous, the shipper is not required to guess at the meaning, at the risk of being called upon years later (perhaps long after he has settled with those to whom he may have sold the shipment) to pay an additional

freight charge, if his guess then be held incorrect. See *Old Dominion Co. v. Penn. Rd. Co.*, 17 I. C. C. R. 309, 312, in which the Commission said:

> "Since, however, in the confusion of these tariffs there appears to have been reasonable ground for the contention of the consignee, and it further appearing that it paid the published rates on the basis of actual weights upon the cars loaded to their full space capacity, it would seem that we are justified, under the circumstances, in dismissing these complaints with the understanding that the defendant carriers are hereby authorized to waive or omit the collection of such unpaid charges on these shipments as are based upon assumed weights in excess of the actual weights of the shipment. . . . We cannot too plainly indicate that our action in these and other like cases arising under the conditions referred to must not be accepted as the basis of excuse for uncertain, conflicting and confusing tariff provisions, which must always give rise to discreditable conditions and practices such as are disclosed in this investigation."

That the tariff of the carriers applicable to the shipment of plaintiff in error is confusing and uncertain and difficult of interpretation is perhaps not open to question. There is a positive statement, apparently without reservation or limitation, that the Amarillo rate of $116.50 per car is applicable to shipments from Hereford (Transcript, pp.

137, 139, 141); and later in the tariff there is a rule, discovered apparently for the first time almost three years after the shipment moved, that routing must be shown to permit the application of any through rates between points on the lines of the parties to the tariff (Transcript, p. 226). In this confusion of tariff authority, if there is "any reasonable ground" (to use the language of the Interstate Commerce Commission in the case quoted from, *supra*) for the construction of the tariff adopted and confirmed by the carriers and upon which rights of consignor, consignee and subsequent parties to transactions involving the commodity shipped have long since been settled, that construction should govern.

That there is such reasonable ground for the construction first given the tariff, plaintiff in error believes is clear, and we ask the court to consider (1) the language of the tariff applying definitely and without the limitations elsewhere stated as to other rates, the rate actually collected: (2) the weight of the testimony given by the tariff men on both sides as to what is reasonably to be inferred from the tariff; and (3) the practical construction given the tariff by defendant in error at the time of the shipment and two and one-half years later when, on the occasion of the refund of the Idaho Falls-Pocatello charge, the $116.50 rate from the point of origin to Idaho destinations was confirmed.

1. An abridgment of the tariff under discussion appears on pages 217 to 227, inclusive, of the Transcript of Record. The court will observe that after an index to points of origin (page 4 of the tariff, page 218 of the Transcript) showing Hereford is one of such points, and an index to points of destination (page 12 of the Exhibit, page 219 of the Transcript), showing Idaho Falls as one of such points (Pocatello being intermediate), there is a grouping of Texas stations (page 26 of the tariff, pages 221 and 222 of the Transcript), and a rate basis given for each station; that is, Amarillo is taken as a base point and the other stations either take the Amarillo rate or there is a differential over or under the Amarillo rate. Hereford is listed as a station which takes the Amarillo rate without any differential; and on page 50 of the tariff (Transcript, pp. 223 and 224) the rate from Amarillo and from stations taking the Amarillo rate without a differential (in ten car lots or more) to Idaho Falls is given as $116.50 per car.

Immediately preceding the list of stations (Tariff, p. 26; Transcript, p. 222), whose rate is thus based on the Amarillo rate, there is an explanatory note (p. 24 of the tariff, pp. 220 and 221 of the Transcript), which reads as follows:

"Section No. 1.

"Item 200—Governing use of differentials shown in Section No. 1, pages 24-31, inclusive.

"The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in Section No. 2 hereof, pages 32 to 51, inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69.

"Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated."

This explanatory note prescribes a limitation on the use of the Amarillo rates as base rates *in certain instances;* that is, where a station does not take the Amarillo rate, but there is a differential —an arbitrary addition to or subtraction from the Amarillo rate—the rate can thus be made up only where "application and routing is provided on pages 56 to 69" of the tariff.

On the other hand, where there is no differential, the Amarillo rate is to be applied, and there is no condition imposed that the use of the Amarillo rate is conditioned upon the existence "of application and routing" as provided elsewhere in the tariff. To illustrate: Abernathy is shown (p. 222 of the Transcript) as a station which takes the Amarillo rate, plus $8.80. This is a differential, and the use of the Amarillo rate of $116.50, plus

the differential of $8.80, to make up the through rate, is permitted only where there is an application and routing provided on pages 56 to 69 of the tariff. Without such application and routing the local rate from Abernathy to Amarillo would have to be applied. Hereford, on the contrary, is shown as a station which takes the Amarillo rate without the addition of a differential, and under the explanation above quoted, there being no differential, the Amarillo rate is applicable and its application is not limited (as is true when there is a differential) to instances where application and routing is provided elsewhere in the tariff.

It is difficult to conceive of a clearer or more positive statement that stations taking the flat Amarillo rate are entitled to that rate without limitation based upon application and routing provisions provided somewhere else in the tariff. If it was intended that the use of the Amarillo rates to such stations was limited by application and routing provisions, it would indeed have been a simple matter to have so stated in the explanatory note above quoted. The inclusion of such a statement with respect to stations taking a differential over or under the Amarillo rate and its omission in the paragraph immediately following explaining the use of the Amarillo rates without differentials, indicate clearly the intention of the framers of the tariff. Indeed, but for such intention, no necessity

at all would exist for the second paragraph of the explanatory note. If, as now claimed by the carriers, Amarillo could be used as a rate basis (whether with or without differentials) only where there was the necessary routing and application shown on pages 56 to 69 of the tariff, it would have been very easy to so state. It is safe to assume that some purpose was intended to be served in making a different explanation with respect to stations taking a differential over or under the Amarillo rate than the explanation about the stations taking the flat Amarillo rate; and since in the one instance it is specifically provided that the rates can be so made only where there is the routing and application referred to, and in the other there is the clear statement authorizing the application of the Amarillo base rate without such limitation, no other conclusion is possible than that the provisions as to routing and application were to be applicable only when stations taking a differential were involved.

The routing and application referred to in the explanatory note above quoted are found on pages 56 to 69 of the tariff (Transcript, pp. 225, 227). The court will observe there is a chart of routes and a space provided for a route number between initial and delivering lines; and there is a note preceding the chart to the effect that where "route number is not shown, there are no through rates

applicable from the originating line to the destination line." In the chart (Transcript, p. 227) there is no route number shown as between Pecos and Northern Texas Railway and the Oregon Short Line Railroad, the originating and delivering lines respectively handling the shipment of plaintiff in error; and the contention of defendant in error (made for the first time almost three years after the shipment was handled) is that there being no through route shown from Pecos and Northern stations to Oregon Short Line stations, the preceding statements of the tariff prescribing the Amarillo rate for Hereford cannot be relied upon, and that the tariff states no rates whatsoever for the transportation between Hereford and Amarillo.

Notwithstanding the positive statement that the Amarillo rates are applicable from Hereford, it is urged that since no through route is shown from Pecos and Northern points (including Hereford) to Oregon Short Line points, there is no through rate, and the local rate must be used from Hereford to Amarillo, from which point the through rate of $116.50 is conceded to be applicable.

The answer to this contention is that a positive statement in the tariff applying the base rate to a given point must control, even though the carriers involved have not agreed upon a through route or a division of the rate to be collected. If the tariff contains a positive statement, as we think it clearly

does, that Hereford should have the Amarillo rate, and there is no limitation or restriction based upon necessity for through routes or joint rates, certainly the shipper need go no further; clearly he may hold the carriers who are parties to the tariff to the positive statement which they have made. How they may adjust the matter between themselves is of no concern to him. All the carriers interested in the shipment were parties to this tariff, and if through lack of agreement for a joint rate, the carriers other than the Pecos and Northern Company were required to pay that company out of the rate collected its full local charge for the transportation from Hereford to Amarillo, that is something which is to be adjusted by the carriers themselves. It is enough for the shipper to know that the tariff to which they are all parties assures him of the right (without limitation based upon through route arrangements) of the Amarillo rate for his Hereford shipments.

The determining question is whether or not the tariff does give this positive assurance with respect to the application of the Amarillo rate to Hereford shipments. We have endeavored to point out that the language of the tariff listing the stations taking the Amarillo rate and those taking a rate slightly above or below the Amarillo rate, and explaining that as to the latter the rate construction is conditioned upon a through route arrangement

with no such limitation as to the former, indicates clearly the intention to apply the Amarillo rates to points such as Hereford regardless of the existence or non-existence of the through route arrangement between the originating and delivering lines. Had the shipment of plaintiff in error originated at a station such as Abernathy (listed as taking an $8.80 differential over Amarillo) the provisions of the tariff authorizing the use of that differential and explaining how and when it could be used would at once advise the shipper that he could not use it, but must pay the local rate, unless there was a through route shown in the chart at page 57 of the tariff. By the specific language of the tariff and of the explanatory note which we have quoted (Tariff, p. 24; Transcript, pp. 220 and 221), this restriction applies only to such stations as Abernathy; and shipments from Hereford and like stations (taking no differentials) are entitled to the flat Amarillo rate. The shipper interested in ascertaining the rate from such stations when he reaches the point in his tariff examination where he learns that the Amarillo rate is $116.50 and that Hereford takes the same rate, is given no reference to any other part of the tariff, or to any provision which might tell him that (as is true when a differential is prescribed) the use of the Amarillo rate *in any event* is conditioned on there being a through routing shown in the chart at the end of the tariff.

But it is urged that there is in the portion of the tariff which states the Amarillo rates an explanatory note to the effect that all of these rates, whether to be used with or without a differential, are dependent upon the "application and routing" provisions of the tariff. There appears on page 32 of the tariff (Transcript, p. 223) the following note:

> "Rates from Amarillo, El Paso-Deming Groups, Item 205.
>
> "The rates shown in Section No. 2, in columns headed 'Amarillo' and 'El Paso-Deming,' are to be applied from stations shown in Section No. 1, as taking Amarillo or El Paso-Deming rate basis or same are to be used as a basis for arriving at through rates from stations shown in Section No. 1 as taking differentials *over* or *under* Amarillo or El Paso-Deming rates, where application and routing is provided on pages 56 to 69, inclusive, from such point of origin to the destination station.
>
> "See also item 200, page 24."

If this note be considered without the concluding direction to "see also item 200, page 24," it would clearly be contradictory of the section of the tariff applying the Amarillo rates to such points as Hereford, in view of the declaration there contained that rates made up by the use of a differential are the ones dependent on the "application and routing" provisions. However, the reference to "item 200, page 24" clears up the difficulty, for item 200

at page 24 is the note just discussed and which distinguishes between the use of the Amarillo rates with a differential and their application as flat rates where no differential is shown. No possible purpose is served by the reference to item 200 if it was not the intention to limit the broad language of this later note in the tariff by calling attention to the distinction made by item 200; so that this latter explanatory note fairly means that all Amarillo base rates are subject to the "application and routing" provisions, *except* as otherwise provided in the preceding parts of the tariff.

It is important to note, too, that the positive statement of the earlier provision of the tariff applying unequivocally the Amarillo rates to such stations as Hereford (Tariff, p. 24; Transcript, pp. 220, 221) contains no reference either to the "routing and application" section of the tariff or to the explanatory note last discussed, and which appears on page 32 of the tariff. Had these references been reversed so that the positive application of the Amarillo rates to stations taking no differential had been qualified by a direction to the later note in the tariff (Tariff, p. 32; Transcript, p. 223) explaining that *all* Amarillo base rates were subject to the provision for a through route, there might be some ground for urging that the latter note was controlling. The only reference connecting these two apparently inconsistent provisions is the one

appended to the note on page 32 of the tariff, and its direction is to "see item 200 on page 24"; and item 200 on page 24 says that where differentials are shown, they are to be used with the base rates "where application and routing is provided," and where no differentials are shown the Amarillo base rates are to be applied as indicated.

Clearly one seeking to ascertain the rate from Hereford would see no necessity for going further upon finding the unequivocal statement that the Amarillo rates were to be applied from Hereford as indicated; and if, notwithstanding the lack of any reference thereto, he came across the note on page 32 (Transcript, p. 223), providing that all Amarillo base rates were to be applied only when application and routing was provided later in the tariff, his mind would be set at ease by the reference added to this note to "see item 200 on page 24," the provision advising him definitely that the application of the Amarillo rates to stations taking no differential was not limited by any requirement for routing and application.

Giving the fullest effect to the note on page 32 of the tariff, there results an ambiguity defeating the purpose of the tariff and requiring the shipper to guess which of the two meanings would be adopted following a judicial inquiry perhaps (as here) years after his rights and obligations with respect to the property shipped had been finally and irrevocably settled.

The Interstate Commerce Act requires no such imposition upon the shipper. If, inadvertently or otherwise, there are two rates stated in the tariff or there are two constructions of the tariff possible, that which is least favorable to the carriers responsible for its publication should control. To concede an ambiguity is to admit the right in the shipper to the meaning of the tariff most favorable to him; and if the application of the Amarillo rates to Hereford is not the only possible construction of the tariff under consideration (as we contend that it is), the subsequent sections of the tariff result only in an ambiguity insufficient to deprive shippers of the advantageous rate arrangement elsewhere clearly stated in the tariff.

2. It is perhaps open to question whether expert testimony as to the interpretation properly to be given railway tariffs is admissible. *O. R. & N. Co. v. Coolidge,* 59 Ore. 5. However, such testimony was admitted and indeed invited (Transcript, p. 52) by the trial court on the assumption that it would be helpful in getting at the meaning of the tariff. We therefore direct the attention of this court to the opinions expressed by the witnesses as to the meaning of the admittedly involved and confused tariff (Transcript, p. 201).

Defendant in error offered no evidence to explain why all concerned at the time of the shipment

construed the tariff as allowing the application of the Amarillo rate of $116.50 from Hereford; nor was there any explanation of the action of the General Freight Agent and of the Auditor of the Oregon Short Line Company (defendant in error) in refunding to plaintiff in error $20.00 per car for the Idaho Falls-Pocatello overcharge and in confirming at that time and by that action the application of the $116.50 rate. No traffic official or rate expert of defendant in error attended the trial, the burden of sustaining the recently discovered construction of the tariff being left to a rate clerk of the Oregon-Washington Railroad and Navigation Company (Transcript, p. 49), and a clerk in the Accounting Department of Oregon Short Line Company (Transcript, p. 152). The latter for less than a year had been in charge of the collection of undercharges for defendant in error and had previously worked in the Freight Accounting Department of the company; and his statement was that he had had 12 years' experience with "undercharges and rates and things of that kind." The testimony of this witness may be wholly disregarded because of his attempt to convince the court that the $20.00 charge assessed for the Idaho Falls-Pocatello transportation and later refunded, was really intended to cover the Hereford-Amarillo transportation (Transcript, pp. 172, 173). The letters of the General Freight Agent and of the Auditor of the Ore-

gon Short Line Company (Transcript, pp. 117-119) show beyond question that the rate collected at the time of shipment was composed of the item of $116.50 covering the Hereford-Idaho Falls transportation and the item of $20.00 covering the theoretical back haul from Idaho Falls to Pocatello; and a refund of $20.00 per car was made because Pocatello is intermediate to Idaho Falls, and there was no authority in the tariff for charging any more for Pocatello shipments than for Idaho Falls shipments. The statement was made in the letter of the Auditor (Transcript, p. 119) "that we have authority from our General Freight Agent to protect the rate of $116.50 per car as claimed."

The rate clerk of the Oregon-Washington Company while admitting that the tariff was involved and was not clear (Transcript, p. 201), argued at length that an examination of the whole tariff indicated an intention not to permit the use of Amarillo rates, with or without a differential, unless a through routing arrangement was shown at the end of the tariff (Transcript, pp. 73-87). No satisfactory explanation appears in his testimony of the fact that the application of the Amarillo base rates to such stations as Hereford, taking no differential (Tariff, p. 24; Transcript, pp. 220-221) is unqualified, although similar application of such rates to other stations taking a differential is expressly limited by appropriate references to other parts of

the tariff; the witness concluding with the suggestion (Transcript, p. 87) "that a tariff cannot be taken on its face. It must be qualified with instructions or application."

It is enough to say of this testimony that the tariffs are designed to apprise shippers of the rates to be charged; and no construction of the tariff should be adopted which requires special qualifications in the theories and practices of rate experts.

For the plaintiff in error two men of wide experience in railroad traffic affairs and in the construction and interpretation of railway tariffs gave their opinion as to the meaning of the tariff under consideration (Transcript of Record, pp. 129, 90). One of them, J. H. Lothrop, had been for nearly thirty years in work of this kind, almost twenty-five years of which was as employe and traffic official of different railroads. For the last five and one-half years he has been secretary and manager of the Transportation Committee of the Portland Chamber of Commerce and of the Traffic and Transportation Association of the City of Portland. He has participated in many rate cases and in many discussions of rates before the Interstate Commerce Commission and elsewhere; and it is safe to say that there is no one better qualified than he to get at the fair meaning of a railway tariff. It was the opinion of the witness Lothrop that the positive application of the Amarillo rates to such stations

as Hereford, especially in view of the limitations imposed on the use of those rates to stations taking a differential, gave complete and ample authority for charging no more than the Amarillo rate of $116.50 for shipments originating at Hereford (Transcript, pp. 137, 138); and the note on page 32 of the tariff (Transcript, p. 223) apparently making the application of all the Amarillo rates conditioned upon through routing provisions was insufficient, in his opinion, to alter the situation, in view of the specific reference contained in that provision directing one back to the earlier provision of the tariff making a distinction between stations taking a differential over or under Amarillo, and those which took no such differential. In answer to a question asked in cross-examination with reference to this note on page 32 of the tariff, the witness said:

> "I think that the further reference under that tariff 'see also item 200, page 24'; you are referred right to that, and it shows there absolutely plain as language can be written that where no differentials are shown, the Amarillo rate as shown in section 2 is to be applied." (Transcript, p. 142.)

We quote further from the testimony of this witness:

> "Q. Is there any reason why a shipper, or anyone else, seeking to find out what the rate from Hereford to Idaho points might be—is

there any reason, so far as you can find, why he might not rest content with what is shown in sections 1 and 2 of that tariff, without going to a section 3?

A. I see no reason why he should go to section 3 after reading that paragraph in section 1. That absolutely fixes the Amarillo rate from Hereford—the same rate from Hereford as from Amarillo. I don't know why he should go any farther. If there had been any intent on the part of the carriers to have you refer to section 3, it should have been so stated in the second paragraph, page 24, of section No. 1, exactly the same as was stated in the first paragraph.

Q. That is, in the paragraph about differentials?

A. Yes.

Q. Which governs as in case of stations like Abernathy, where there is a differential shown?

A. Yes.

Q. To stations where there are no differentials?

A. You are referred to that particular part of section 3, and if the same was intended to apply where there was no differential shown from the points of origin, why, that should also have been included in the second paragraph. The two paragraphs are absolutely separate and distinct. You cannot read a part of the first paragraph into a part of the second—into the second paragraph.

Q. Whether or not any through route was shown by any part of the tariff between Pecos & Northern Texas points and Oregon Short Line points, there was a through route from Amarillo?

A. Yes, sir.

Q. And it was entirely possible for the carriers concerned to absorb, as they call it, the local from Hereford to Amarillo and make the Amarillo rate applicable from Hereford?

A. Yes, sir."

George F. Anderson, the other witness for plaintiff in error, is traffic manager of the Union Meat Company. His experience in traffic and rate matters comprised six years' work as rate clerk for a transcontinental railway, twelve years as traffic manager for Swift and Company and eight and one-half years as traffic manager of the Union Meat Company, the latter two employments requiring of him familiarity with livestock rates and tariffs especially (Transcript, p. 94). It was Mr. Anderson's examination two years after the shipment involved of the freight bills and the allowance of the claim made by him for the $20.00 Idaho Falls-Pocatello overcharge that probably brought up the whole question of the rates and probably resulted in the claim later advanced that a mistake had been made in applying the Amarillo rates to Hereford (Transcript, pp. 111-120).

This witness at the time of the refund of the

$20.00 per car charge two and one-half years after the shipment made a careful examination of the tariff in question, and concluded then that the Amarillo rate of $116.50 was clearly applicable from Hereford (Transcript, pp. 26, 97); and on that basis he obtained a refund of the additional $20.00 per car collected for the theoretical Idaho Falls-Pocatello back haul (Transcript, p. 99). His explanation of the tariff here on the witness stand was similar to that given by the witness Lothrop; that is, it was his opinion that the positive statement of the tariff applying the Amarillo rate of $116.50 to such stations as Hereford taking no differential being complete in itself, settled absolutely the right to that rate without regard to what might be said elsewhere in the tariff.

As previously suggested, it may be that it is the duty of the court to determine for itself as a matter of law the meaning of the railway tariff. In point of fact, many of these tariffs are intricate and involved, though perhaps not to the extent of the tariff under consideration here; and in actual practice it is probably necessary and proper to consider the opinions of men whose experience make them peculiarly qualified to interpret tariffs. The testimony which we have reviewed establishes clearly that the weight of evidence on this question of interpretation is with plaintiff in error. The witnesses for plaintiff in error were clearly better

qualified to speak on the subject of the meaning of the tariffs, and their explanations are clear and convincing. When it is remembered that the design of the tariffs is to acquaint the shipper with the rate he is to be charged, no more should be asked of him than that he adopt a construction of the tariff for which there is a reasonable basis. *Old Dominion Co. v. Penn. Rd. Co.,* 17 I. C. C. R. 309, 312. That there is such a reasonable basis for the construction of the tariff first applied and later confirmed by the carriers and now advocated by plaintiff in error, is established by the expert evidence in the case; and if it is proper to consider evidence on the subject, the position of plaintiff in error is clearly established by the testimony.

3. We cannot too strongly urge upon the court that if the meaning of this tariff is doubtful (and this is conceded, Transcript, p. 201), the practical construction given it by the carriers at the time of the shipment and by the defendant in error two and one-half years later when the Idaho overcharge was refunded is of the utmost importance. The carriers are required under the Interstate Commerce Act to collect the full amount of the charges stated by their tariffs and a mistake in the original collection or in its collection at the time of shipment does not affect the right and the duty to enforce full payment by the shipper. Where, how-

ever, the tariff is not clear, where it is susceptible of two constructions and where there is a sharp dispute between traffic and rate men as to which construction should control, the decision of the carriers made when the charges were assessed, and the confirmation of that position upon re-examination two and one-half years later, should be of the greatest assistance in determining what a shipper should reasonably be required to assume was permitted by the tariff.

As already pointed out, we are not concerned here with the task of finding out what the framer of the tariff intended. Obviously that intention was to have the tariff open to but one construction as to the rate chargeable, but if that intention was not carried out and the tariff left ambiguous, the shipper would be bound only by that construction of the tariff for which there was a reasonable basis; and what the parties have actually done with respect to the interpretation of the tariff goes a long way toward determining the presence or absence of that reasonable basis.

As already explained, the carriers involved in this transportation collected and divided among themselves charges based upon the application of the Amarillo rate of $116.50 to Hereford. No rate-revising clerk, traffic or accounting official of any of the carriers involved suggested for more than two and one-half years that any other construction

of their tariff than the one applied at the time of the shipments was possible; and it is perhaps safe to assume that if plaintiff in error had not demanded and collected the overcharge resulting in the $20.00 per car collection for the Idaho Falls-Pocatello theoretical back haul, the claim now made by defendant in error for the local charge of $26.40 per car for the Hereford-Amarillo transportation would never have been heard of.

We may infer that the requirements of the Interstate Commerce Act compel a careful examination of the tariffs by the carriers, not only when rates are quoted and later when charges are collected, but also when the freight bills and the remittances reach the accounting staffs of the carriers. Each carrier has its rate revision bureau and the quotation and collection of rates are no doubt most carefully scrutinized so that instances of under collections may be found and the mandate of the law observed by a subsequent collection. In the absence of testimony to the contrary, it is fair to assume that all of this was done with respect to plaintiff's shipment; and certainly two and one-half years ought to be ample time for the ascertainment of error in the collection of freight charges.

The claim now made that there was an error in applying the Amarillo rate to Hereford, supported by an argument of an accounting department clerk

and of a rate clerk of another carrier, disregards the conclusion which must have been reached by all concerned at the time of the shipment. It is to be borne in mind, too, that this shipment was not one of minor importance. It consisted of 43 cars, and the total charges paid amounted to over $6,000.00. Surely the question of the rate applicable must have received careful consideration, both on the part of the traffic officers soliciting and securing the shipment and on the part of officials charged with the duty of collecting and distributing the transportation charges.

If, as is virtually conceded, opinions may well vary as to what the tariff does mean, it is difficult to say why defendant in error is entitled to urge its present construction of the tariff, poorly supported in the record as it is, as opposed to the construction given the tariff by its representative and by representatives of connecting carriers who had the responsibility of quoting the rate and of collecting the charges at the time of the shipment.

Of great importance, also, is the confirmation of the $116.50 rate at the time of the refund made to plaintiff in error two and one-half years after the shipment. It is true that the question now before the court, that is, the propriety of applying the Amarillo rate from Hereford, was not specifically discussed in the correspondence between the parties on the subject of this refund. The court will

note, however, that in the letter addressed to the General Freight Agent of defendant in error (marked for his personal attention), there was a specific reference to the rate of $116.50 and its application from Hereford. This letter said (Transcript, p. 118):

> "It seems as though this rate was based on a through rate of $116.50 for 36-foot 6-inch car from Hereford to Idaho Falls, plus $20.00 Idaho Falls to Pocatello, based upon the application of item 5 of tariff 2271-B, I. C. C. 265."

This letter was answered by the Auditor of defendant in error under date of January 16, 1915. The answer, after a reference to the personal letter to the General Freight Agent, said that "we have authority from our General Freight Agent to protect the rate of $116.50 per car as claimed."

Here again we may assume, in view of the mandate of the Interstate Commerce Act, that a most careful check of the applicable tariffs was made. Certainly no carrier in these days of strict adherence to published tariffs would be willing to turn back to a shipper over $600.00 of the freight charges paid by him without the most careful examination of the tariffs, and without the conclusion that those tariffs justified and required the remission. While the subject of the Hereford-Amarillo charge was not specifically referred to in the correspondence about the overcharge, of necessity it

must have been considered by the carriers before the refund was made. The propriety of the total charge of $136.50 was questioned by plaintiff in error, and defendant in error after due consideration came to the conclusion that no more than $116.50 per car was properly collectible.

We repeat again that if there is doubt as to the meaning of the tariff under consideration, no reason exists for accepting the construction now advocated by defendant in error instead of that necessarily adopted upon a review of the subject at the time of the refund two and one-half years after the shipment. In any transaction not affected by the requirements of the Interstate Commerce Law, such a practical construction by the parties involved would be an absolute bar to the assertion of a claim like that now made by defendant in error. We assert that there is nothing in the Interstate Commerce Law or in its mandate requiring the full collection of all tariff charges which prevents the acceptance of the construction given to this tariff by the carriers at the time of the shipment and at the time of the refund. Concededly, the tariff was open to two different constructions, and the shipper was fairly entitled to adopt that construction first applied so long as there was a reasonable basis for it. Unquestionably there was a reasonable basis for the construction of the tariff under which the Amarillo rate was applied to Here-

ford, since all concerned so interpreted the tariff until almost three years after the shipment; and we assert that this construction should now be binding upon defendant in error.

The injustice to a shipper of enforcing collection of an undercharge account years after the shipment moved is apparent. In most instances the property shipped is the subject of sale at the time of or not long after the transportation, and the price received is usually influenced by the freight charges paid. When additional freight charges are demanded years after the shipment, the shipper has no recourse upon his purchaser, and the collection from him turns his transaction from a profit to a loss. One of the objects of the publication of tariffs is to inform the public of the charges collectible so that in business transactions including transportation of property the shipper may know the expense to be incurred and make his bargain accordingly.

The hardship to the individual shipper resulting from the enforced collection of undercharges long after the transaction has been closed has frequently been the subject of consideration by Congress; and thus far no way has been found to relieve from that hardship without impairing the effectiveness of the provisions of the Act forbidding preferences. We understand there is before the present Congress a bill designed to limit to two

years the time within which the carriers may enforce undercharge claims. While the six-year period usually allowed by state statutes is the only time limit imposed restricting the collection of undercharges, the Interstate Commerce Act, as construed by the Commission and the Commerce Court, limits the time for recovering from the carriers unreasonable exactions of freight charges to two years *from the time the shipment moved. Blinn Lumber Company v. Southern Pacific*, 18 I. C. C. R. 432; *Arkansas Fertilizer Co. v. U. S.*, 193 Fed. 667. The result of this anomalous situation is that the carrier may delay (as did defendant in error here) the prosecution of its alleged claim for undercharge until more than two years after the time of shipment; and then if recovery is allowed, the shipper has no recourse whatsoever, even though the tariff under which the undercharge was collected was wholly unreasonable and would be so determined by the Commission and the courts. It is safe to say that the Commission would readily condemn the tariff under consideration here as unreasonable if it is properly interpreted as requiring the additional collection of the $26.40 local rate for the transportation from Hereford to Amarillo, but the lapse of time before prosecution of the undercharge claim is such that the plaintiff in error would be entirely without remedy.

The effort to enforce collection of the undercharge claim in this case results, we assume, from

the notion that the Interstate Commerce Act requires such action; that, regardless of the hardship to plaintiff in error, the necessity for equal treatment to all requires enforcement of the published tariffs. Because of the evident injustice to the individual shipper, however, the added burden should not be imposed unless there is the clearest necessity for so doing. Only when the published tariff clearly and unmistakably requires it should the shipper be assessed an additional charge long after the burden of this charge can be distributed or placed where it properly belongs.

It is not enough that a careful analysis of the tariff may lead to the conclusion that its framers intended not to construe the tariff as did the carriers at the time of the shipment and at the time of the refund. The intention of the framers of the tariff, particularly under such circumstances as exist here, should give way to that which might reasonably be inferred from the language of the tariff. In other words, if there is any reasonable basis for the construction of the tariff permitting the application of the Amarillo rate of $116.50 to Hereford shipments, no other construction should now be adopted.

The opinion of the trial court (Transcript, pp. 15-20) makes this point clear. Referring to the portion of the tariff which applies without restric-

tion the Amarillo rates to such stations as Hereford, the court said:

> "Reading the explanatory note to section 1 by itself and without reference to the succeeding notes, its meaning would appear to be plain that where there were differentials the rates shown in section 2 would not apply unless the routing was provided on pages 56 to 69; but that where there were no differentials shown, the shipment would take the section 2 rates without regard to whether the application and routing were provided on pages 56 to 69 or not."

The court then goes on to consider all of the other provisions of the tariff and, taking the entire 70-page document as a whole, concludes that the intention of its framers was to permit the application of the Amarillo base rates, whether with or without differentials, only where through routes were shown. The opinion demonstrates, however, that (1) a shipper examining the tariff to ascertain the Hereford rate would be led to page 24, where he would be informed without qualification that the Amarillo rates were to be applied; and (2) to be advised that the contrary was true, it would be necessary for him to read the entire tariff, study its plan of construction, and put himself practically in the position, not of one seeking information as to a particular rate, but rather of one aiming to learn the theory upon which the entire structure of rates stated in the tariff was based.

We believe that the Interstate Commerce Act places no such burden upon the shipper. The tariffs are the announcement to the public of the rates to be charged, and the public is entitled to rely upon that construction which is reasonably to be drawn from what is said in the tariffs. As suggested by the Interstate Commerce Commission in the case cited *supra*, if there is any reasonable basis for the construction upon which the shipper has relied, that construction should govern; and it should make no difference that a careful, judicial analysis of the entire tariff leads to a conclusion that the framers of the tariff intended that it should have a different meaning. The shipper when he contracts for the transportation and contracts to sell his product, basing his price in part on the transportation cost, cannot have the benefit of a careful, judicial inquiry into the intention of the framer of the tariff. He must rely upon what the tariff apparently says with reference to the particular rate he is interested in; and if there is any reasonable basis for the conclusion which he reaches with reference to the rate applicable to his shipment, he should be protected in relying upon that conclusion.

We assert that the record here abundantly supports the conclusion that this tariff should be construed as the carriers construed it at the time of the shipments, and at the time of the refund two

and one-half years later. But if we are wrong in this, certainly there can be no doubt of the ambiguity of the tariff. The practical construction of the tariff by the carriers, the opinion of the experienced witnesses as to its meaning, and the opinion of the trial court indicating how the new construction of the tariff is arrived at, demonstrate that whatever conclusion one may reach independently as to the intention of the framers of the tariff, the question of its meaning is an open one, and the shippers and the public may well rely upon either construction. In this situation there is a reasonable basis for the construction of the tariff first adopted and later confirmed by the carriers; and this is enough to deny to the carriers the right to change to the construction of the tariff now claimed.

Respectfully submitted,

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